MICHIGAN SUPREME COURT

PUBLIC HEARING
September 24, 2008

CHIEF JUSTICE TAYLOR: Good morning. We're here today for a public hearing on the Court's administrative docket. The ground rules are that each speaker gets three minutes. When the red light comes on, that means that your time is gone. Our first item is 2006-09 - Daniel Quick.

ITEM 1 – 2006-09 – Proposed Adoption of the Amendment Of Rule 7.202 of the Michigan Court Rules

MR. QUICK: May it please the Court, Daniel Quick, good morning. I appear today as a member of the State Bar of Civil Procedure and Courts Committee, and have been asked to be present in the event that members of the Court have any questions or comments on the various proposals that started with our committee and moved through the State Bar for this part of the process. I don't have particular comments on this proposal –

CHIEF JUSTICE TAYLOR: All right.

MR. QUICK: but yes I will give –

CHIEF JUSTICE TAYLOR: Are there any questions for Mr. Quick?

JUSTICE YOUNG: Yeah. Would you take the message back to your colleagues that – I can't imagine a lawyer responding to his client's problem by saying well here are a lot of problems, and I'd be happy to form a committee to think about them if you want me to. That's essentially what the Appellate Practice Section did in response. I mean I value the wisdom and experience that the State Bar members can share with us about it, but it's extraordinarily unhelpful to raise a lot of problems and not attempt to address them. That's essentially what I see in the Appellant Practice Section's –

JUSTICE CORRIGAN: But this gentleman's representing Civil Procedure.

JUSTICE YOUNG: Oh, I'm sorry – I'm sorry. Well, take it back anyway.

MR. QUICK: I'll find the email address and send that on.

JUSTICE YOUNG: Okay. That's all right, I'll write directly I'm sorry.

MR. QUICK: Thank you your honor.

CHIEF JUSTICE TAYLOR: It's a near miss. Item #2 – 2006-16 – Timothy Baughman.

ITEM #2 – 2006-16 – Proposed Adoption of the Amendment of Rules 6.302 and 6.310 of the Michigan Court Rules

JUSTICE YOUNG: You represent the Appellate Practice Section –

MR. BAUGHMAN: No. Good morning your honors. Tim Baughman. In the *Killebrew* case this Court said that - included a trial judge shall not initiate or participate in discussions aimed at reaching a plea agreement, he shall not engage in the negotiation of the bargain itself, and the ultimate line of the trial court's role – trial judge's role in the plea bargaining procedure shall remain that they be a detached and neutral judicial official. I think the Court had it right then, and I think the rule that is proposed would return the trial judiciary to that position, and I advocate the Court adopt that.

CHIEF JUSTICE TAYLOR: Mr. Baughman a couple of questions. One of the reoccurring comments in this area is that if we do this the trains won't keep running number one. Number two do you have any information on how frequently *Killebrew* as opposed to *Cobbs* pleas are used. I mean is the one the overwhelming favorite and the other one hardly ever used – that sort of thing.

MR. BAUGHMAN: Well, as to the first point, I've been around long enough that I actually filed an amicus brief back in the *Cobbs* case and I tried to point out there and you could find the brief in your archives – I found the brief but I couldn't find the charts I had attached – I did a look at the State Court Administrator's statistics at the time and they showed that after the Court banned judicial involvement in plea negotiations in *Killebrew*, for the years just prior to that and the years just after that, the plea to trial ratio actually went up. In other words, there were more pleas per trial after *Killebre*w than there were before. So I'm not quite sure what it was *Cobbs* trying to solve – what problem had occurred after *Killebrew* that *Cobbs* needed to solve when we were actually having more pleas per trial than we were before *Killebrew*. So – And where we are now – I just looked at the State Court Administrator's stats for 2007 last night now my amicus

brief from back then points out that the ratio had gone up to about 12½ pleas per trial after *Killebrew*. Last year there were slightly under 57,000 pleas statewide in 2,700 trials. That's 22 pleas per trial. I think the system could stand a few more.

JUSTICE YOUNG: But you're really aren't – but you aren't really focusing on the Chief Justice's question as to the distinction between the two, and if I could refine the issue. Leaving aside the threshold issue whether judges should ever be involved in plea bargaining, and frankly the published rule does not eliminate that because it still preserves the right to withdraw a plea if there's an agreement as to a sentencing range –

MR. BAUGHMAN: Between the parties.

JUSTICE YOUNG: Between the parties. My question is related to the Chief Justice's question. If you leave aside the propriety of a judge ever becoming involved, I see an asymmetry between the *Cobbs* plea and a *Killebrew* plea in this regard. If a judge becomes involved and in affect blesses provisionally an agreement reached by the prosecutor and defense, it seems to me to make some sense as a quid pro quo to allow the defendant to withdraw his plea if the judge decides based on later information he can't, or she can't, follow the agreement. In the *Killebrew* context, however, we have an entirely private arrangement. The prosecutor and defense get together and say this is what we want, the judge is never involved, and I don't understand why that kind of mutual agreement has any greater bearing than a prosecutor only sentence recommendation in a plea process.

MR. BAUGHMAN: Okay.

JUSTICE YOUNG: Why is there a quid pro quo that allows the defendant to withdraw? That's one question, and second how frequent? What I don't understand is when is a *Killebrew* plea come up when you have the availability of *Cobbs*?

MR. BAUGHMAN: Okay. Let me try to quickly – hit in a number points really quick, because I do want to address just a little more –

JUSTICE YOUNG: Okay.

MR. BAUGHMAN: will the train stop running. I think if we have as many pleas to trials as we do now, the trains running fine. And if that number is reduced somewhat the train would continue to run and, in fact, it might be better if we had a few more trials. Plus, I believe that with sentence guidelines that are now mandatory and weren't when we had *Cobbs* with substantial compelling reasons that are objective and verifiable in order to depart and the judge now has

to articulate with some degree of precision, what – where the departure came from, that degree of departure, that that's enough information for the parties without the judge's involvement to make an intelligent decision about a plea without a judge saying hey I'll give the bottom end in order to induce the plea. We know the range; we know what's required for departure that should be enough. And I think actually that would sort itself out and the plea and trial ratio probably wouldn't change much at all. Now as to the *Cobbs* – that's essentially what happens and that's the bulk of the pleas frankly and that's the *Cobbs*. What happens is the judge will say here's what the guidelines tentatively seem to work out at, I'll sentence you either within the guidelines, the bottom end, whatever, and that's the discussion that occurs, and then if the defendant – and I agree, if the defendant came in and pled based on that representation by the judge and the judge said you know having further looked at it – and the other thing that I won't go into now, but is in my letter, having listened to the victim and read the impact statement which gets overlooked in all these *Cobbs* pleas, I can't follow the *Cobbs* and then the defendant should withdraw his plea. A *Killebrew* plea, as opposed to a *Cobbs* plea, is the parties without the judge's involvement reach an agreement as to what an appropriate sentence is. The federal system allows that, this proposed rule would allow that. The parties reach an agreement, this is what the sentence shall be, take it to the judge who – and the judge without being involved in the negotiations can say, at least tentatively, I can live with that that's fine. If that's what the two parties think is appropriate, I will sentence in accordance with that. And –

JUSTICE YOUNG: Wait a minute; wait a minute. I don't - It sounds a lot like a *Cobbs* plea, but at the back end.

MR. BAUGHMAN: It is at the – that's exactly what it is without the judge involved in the negotiation process; the parties reach the agreement.

JUSTICE YOUNG: But wait a minute. Why is – if the judge isn't involved such that the defendant has a reliance on what the judge will do, why should a privately negotiated plea agreement afford the defendant the right to withdraw his plea if the judge declines to go along with the private negotiated agreement?

MR. BAUGHMAN: Because for the private negotiated plea to work the judge has to ratify it before the plea is taken so it then – the judge then becomes involved as the ratifier but not the negotiator. And the defendant again gets to withdraw because if the judge ratifies and then says you know I really can't do that – and actually that would work for both ways. If the judge said to the prosecutor I really think I need to go lower and there's been a plea to a lesser charge, the prosecutor can say well then never mind I'm gonna go to trial on the higher charge.

Because that's an agreement between the parties for a specific sentence ratified by the judge or nobody's gonna take the plea.

JUSTICE YOUNG: If we reject your initial premise that judges should not be involved in this, is there any real world dislocation by leaving the *Cobbs* and *Killebrew* regime in place?

MR. BAUGHMAN: Well, the only dislocation is is my initial comments that I think that's not the way a system should work –

JUSTICE YOUNG: I understand, but if that's repudiated –

MR. BAUGHMAN: No, I –

JUSTICE YOUNG: is there any reason – any further reason – for this Court to look at *Cobbs* or *Killebrew*?

MR. BAUGHMAN: I'd like to go back to *Cobbs* and say was there any reason for the Court to be – to fix what wasn't broken then, but my answer would be in my opinion, and I can only speak anecdotally, yes it would stop what I see as a fairly common practice of judges without a lot of review of what's going on, no consideration of the victim, saying to defendants I'll give you the bottom end of the guidelines if you plead.

JUSTICE CORRIGAN: Mr. Baughman can I interject because I read all the letters and was taken with – especially Judge Hogg's and Judge Farah's letter in terms of the undesirable aspects in what you point to. Would it be an improvement over our currently *Cobbs* practice to require that *Cobbs* discussions be on the record and not in a backroom office?

MR. BAUGHMAN: Yeah. If it's – you know obviously I wish it would not be continued at all. If it is continued, absolutely I think it has to – it should be on the record.

JUSTICE CORRIGAN: Because that would take away some of the terrible aspects that Judge Hogg writes about. The other thing I wondered is Judge Farah talks about up in Genesee County, or over in Genesee County, they have their *Cobbs* in writing, and I'm wondering – that seems somewhat inefficient to me, but I was wondering what you thought about that piece of his recommendation.

MR. BAUGHMAN: That might be an improvement. I think at least be on the record makes sense. I'm not sure if the in writing is necessary, but again my

concern tends to be when we cut the victim out of the process when they have a constitutional and statutory right to be heard and to be heard for more than psychological reasons because the *Cobbs* decision was made by the judge much before that and it is, at least in my county, skewed toward the low end in order to induce the plea. I mean judges – keeping the railroad running, keeping the train on the tracks, is an incentive that is a real world one, but the very fact that it is an incentive the judges have is a reason I think to separate them from this process.

JUSTICE MARKMAN: Why is that a different incentive than the prosecutor has? I mean why doesn't the prosecutor have exactly the same incentive to keep the railroad on the time?

MR. BAUGHMAN: And the prosecutor does, and that's why I believe there won't be massive changes in this, it will be kind of around the edges. Prosecutors are gonna still negotiate pleas, and the plea will frequently not be the *Killebrew* plea it will be – the parties have come to an agreement as to what the guidelines range is, and we agree if the judge consents that the judge will sentence within the range.

JUSTICE MARKMAN: But the whole premise of the argument is that somehow the judge is induced to go in a different direction. His strategic premises are different than that of the prosecutor.

MR. BAUGHMAN: Yes.

JUSTICE MARKMAN: Undoubtedly they are, but can you elaborate on that?

MR. BAUGHMAN: Well, I think the judge's strategic – the prosecutor may well be happy in a particular circumstance to take a plea if the sentence is in the mid-point of the guidelines or in the high end of the guidelines where the judge is, early on, is skewed toward the low end so I think, and I don't have data to back it, I think we would find that there are a lot more low end guideline sentences than would occur if the judge was not involved in the plea bargaining process. If the judge was presented with the plea to the same charge with an understanding as to what the guidelines were which were the same as they were before, but without his hands tied by having said already I'll give you the bottom end we'd get some higher sentences.

JUSTICE MARKMAN: Is that precisely what you mean when you say that you think the current *Cobbs* procedure arguably gives inadequate consideration to the victim?

MR. BAUGHMAN: Yes I think it does. I think – and if the prosecutor –

JUSTICE MARKMAN: Because of the phenomenon you just described?

MR. BAUGHMAN: Yes. I mean the prosecutor in the plea bargaining process in our office, and I think around the state, is definitely taking into account and discussing with the victim what an appropriate resolution might be including what the appropriate sentence might be, but these *Cobbs* evaluations that judges are giving occurring early on you may have an impact statement coming in later and you may have a victim standing up at the lectern speaking, but the judge has already told the defendant what sentence he's getting.

CHIEF JUSTICE TAYLOR: Yeah, that's all show trial. Can I ask you? The world that you would like to see is one where the prosecutor and the defendant can present a proposal to the judge and the judge can follow it or not after he has reviewed the documents and heard the victim.

MR. BAUGHMAN: That's correct. And if the defendant has pled based on the understanding that there's a tentative agreement that yes I can do that and the judge says no I can't, then the defendant does get to withdraw. That's the way it works federally and in the other jurisdictions that have followed that model.

CHIEF JUSTICE TAYLOR: So the prosecutor and the defendant present the deal to the court –

MR. BAUGHMAN: Yes.

CHIEF JUSTICE TAYLOR: the court looks at it and says I can't do it and he gets to withdraw.

MR. BAUGHMAN: Right.

CHIEF JUSTICE TAYLOR: Does he get to know what the judge is going to do before he decides to withdraw?

MR. BAUGHMAN: Under the current regime I think the answer's no, and I would leave it that way. In other words, the judge just says I can't follow this agreement –

CHIEF JUSTICE TAYLOR: And then he has to decide if he wants to roll the dice.

MR. BAUGHMAN: You can withdraw and have a trial or you can take whatever it is I decided is going to be appropriate now.

CHIEF JUSTICE TAYLOR: Let me ask you. Do you think there'd be any benefit to having trials – trials in the nonnormal sense I mean a demonstration project perhaps in comparable counties, perhaps Saginaw and Kalamazoo, where you try these things out and then come back a year or so later and find out what that has done to the plea bargaining process.

MR. BAUGHMAN: That might not be a bad idea. Again my 17-18 year old attempt at doing that by looking at the stats before and after *Killebrew* was to say state-wide - this kind of experiment statewide – what happened after *Killebrew* and the result then, if we can learn anything from that past was that it did not adversely affect the number of pleas. If we want to view it, an adverse affect has them going down. It didn't happen then, I don't think it would – I think it's less likely even to happen now that we have mandatory guidelines that have to be followed except –

CHIEF JUSTICE TAYLOR: Because there's so much more certainty as to what it should be.

MR. BAUGHMAN: Yes, exactly.

JUSTICE MARKMAN: Has PAAM taken a position on this?

MR. BAUGHMAN: I don't think there's a letter from PAAM in the –

JUSTICE MARKMAN: You're not speaking for PAAM.

MR. BAUGHMAN: I'm not speaking for PAAM.

JUSTICE MARKMAN: Do you have sense of what the general sentiment would be among the prosecutorial community –

MR. BAUGHMAN: Well, there is one letter I believe in the file from a prosecutor who is opposed, so I think there's probably a split of an opinion, but I think some – but I tend to think those who are opposed to my view just don't fully understand the ramifications of it. But it really wouldn't affect a lot in terms – other than getting the judge out of it, but the outcome in the end would be I believe sentences a little higher up in the guidelines and a sentence process that I think is more above board.

JUSTICE MARKMAN: Mr. Baughman can you tell me how do we respond, how do we react, how do we think about the statement of the Michigan Judges Association which is not merely opposed to your proposal, but I think they go out of their way to say they're adamantly opposed to your proposal. What cognizance to we give that?

MR. BAUGHMAN: Well, I mean it's difficult because I mean they're the people you have to deal with. What I would say, but I don't think you can say, it's difficult to let go of power and authority, and that's what they'd have to do letting go of. But I would point back to look when we did this in *Killebrew* the real world train wreck that you're worried about didn't happen. And now given what's in place in terms of sentencing it's much less likely to happen. And maybe a demonstration project would be a way to do that although again I think the system calls for this whatever the stats are. But the stats – the history of it and the current sentencing scheme to me suggests that those worries just are not real.

JUSTICE MARKMAN: Can I ask you one more question? If this Court chooses, is there any reason why it can't address either the *Cobbs* or the *Killebrew* issues exclusively? Is there some subtle connection between these issues that suggest that if you deal with one you better deal with the other? I know you feel that maybe courts shouldn't be involved at all in this process, but if we think there's a problem in *Killebrew*, but we can live with *Cobbs*, are we missing something?

MR. BAUGHMAN: Well, I do think they're related in the sense that I don't know that anyone anywhere in the country is opposed to the notion of with the judge not involved in negotiating process the parties reaching an agreement that the judge can ratify and that's *Killebrew*.

JUSTICE MARKMAN: But there isn't an opposition to allowing the defendant to withdraw I think.

MR. BAUGHMAN: Yeah, if it's not followed yes, so that – I don't know of anybody being opposed to it. It's the judge sitting down with the parties and saying you know as Judge Hogg said here's what I think your case is really about, you're likely to get convicted, or you're likely to get an acquittal, and you really ought to come it I would give you the low, that keeping the judge out of that and letting the parties deal with that making it a pure *Killebrew* situation – again I don't think would an adverse affect –

CHIEF JUSTICE TAYLOR: How is your proposal a modification of *Killebrew?*

MR. BAUGHMAN: Pardon?

CHIEF JUSTICE TAYLOR: How is your desired resolution a modification of *Killebrew?*

MR. BAUGHMAN: It's really not a modification of *Killebrew*.

JUSTICE YOUNG: It's a codification.

MR. BAUGHMAN: Yeah.

CHIEF JUSTICE TAYLOR: Basically what you're arguing then is to get rid of *Cobbs* and go with *Killebrew*.

MR. BAUGHMAN: Exactly. It's the – the judge's role is to ratify what the parties agree to, the judge is removed from the negotiation process entirely, that's what I'm after.

CHIEF JUSTICE TAYLOR: All right. Thank you Mr. Baughman.

JUSTICE WEAVER: Excuse me. Did I hear you say that you felt you would get higher sentences by (inaudible)?

MR. BAUGHMAN: I think that the hydraulic pressure now of the judges and what they do is they will *Cobbs* plea on the low end of the guidelines in order to induce pleas. If they just got the plea with even an understood guideline range but had not committed a low end sentence, we'd get sentences more in the range that were not always at the bottom so there would be some higher sentences. Now we're talking ranges of you know if it's 40 to 70 months instead of getting 40 you might get 55, but we wouldn't be getting so many that are right at the bottom because judges wouldn't have made that commitment in order to get the plea.

JUSTICE WEAVER: Your plan then would if the judge doesn't accept it, then he would be able to withdraw the plea.

MR. BAUGHMAN: Exactly.

JUSTICE WEAVER: That's what you're proposing.

MR. BAUGHMAN: If the parties had said – had gone so far as to say we agree the guidelines are 40 to 70 months and we have agreed that an appropriate sentence would be right in the middle 55 months, and the judge came back and said I can't do it, I think in the middle is too low, then the defendant having been

induced to plea by that tentative acceptance would be allowed to withdraw if he wanted to.

JUSTICE MARKMAN: You read our decision in *Killebrew* to suggest that a judge who participates in the process along the *Cobbs* line is arguably acting in other than a detached a neutral manner.

MR. BAUGHMAN: Yes, I think that's – and the cases that discuss the federal rule, I know there was Judge Warren's concern there would – you know about federalism – I'm not saying we should follow the federal system because the feds are better. The question is does that make sense. The cases that expound on the federal rule make exactly that point that it's – no matter how you dress it up there is at least in some circumstances a pressure on the defendant or a pressure on the prosecutor that really ought not be there in the system.

CHIEF JUSTICE TAYLOR: Thank you sir.

MR. BAUGHMAN: Thank you very much.

CHIEF JUSTICE TAYLOR: Item #3 – 2007-24 – Michael Hindelang.

ITEM #3 – 2007-24 – Proposed Adoption of the Amendments of Rules 2.301, 2.302, 2.401, and 2.506 of the Michigan Court Rules

MR. HINDELANG: May it please the Court. Michael Hindelang your honors. I'm the co-chair of the E-Discovery Practice Group at Honigman Miller Schwartz and Cohn. Thank you for this opportunity and for the opportunity to submit the comment letter we submitted in July. As a preliminary matter I bring with me today, and I provided to the clerk, a letter from sixteen different organizations and companies that do business extensively in Michigan indicating support for the comments that Mr. Devine and I made in July. I'd like to address two primary points this morning. The first is the mandatory involvement of the trial court with e-discovery, the concern raised by Justice Corrigan in her concurrence to the proposed order, and the safe harbor provision. The first is the mandatory involvement. I think there are two key ways to address this. 2.301(a) indicates the trial court shall address e-discovery in its scheduling orders. Simply making that permissive allows it to be addressed, if necessary, otherwise there's no need for it. Second and of more concern is 2.302(b)(5). This has two parts to it. The first is a codification of the common law preservation duty for ESI. The

second is a mandatory role of the trial court to give permission to delete potentially relevant information to a lawsuit. That is of extreme concern. By requiring judicial permission, affirmative permission, before information can be deleted, the natural result is going to be regular motion practice and pending lawsuits, and perhaps even the filing of miscellaneous actions for prospective lawsuits seeking permission to delete information.

JUSTICE YOUNG: Counsel? I'm curious. You have proposed as to that provision a provision that one uses a term of art which I suppose those in the litigation hold which may be current in the community in which you practice, but my broader question is why didn't you just propose civil procedure rule 37(e)?

MR. HINDELANG: For two reasons your honor. The litigation hold is referred to in the staff comment to the federal rule 37(f) at the time now 37(e), indicating that the litigation hold is an intervention of the routine operation of an information system. And the litigation hold is of a sort of term of art when the litigation is reasonably anticipated. It's the suspension of records retention policies that would permit the deletion of potentially relevant (inaudible).

JUSTICE YOUNG: Here's what 37(e) says. "Absent exceptional circumstances, the court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of electronic information systems." What's wrong with that?

MR. HINDELANG: Only one thing your honor. To the extent that litigation takes a left turn during the pendency of the lawsuit, it goes somewhere not anticipated by the defendant. The litigation hold that was in place should have some affect. We want to incentivize good behavior. In other words, if a company places a litigation hold procedure in place and it operates as intended so we're now outside of the scope of 37(e).

JUSTICE YOUNG: But the federal rule doesn't have that -

MR. HINDELANG: That's correct.

JUSTICE YOUNG: explicitly so I'm asking you are they having problems in the federal system with rule 37(e)?

MR. HINDELANG: The rule 37(e) has not been fully explored yet your honor, we are only – we're less than two years in to the e-discovery regime and the decisions are just beginning to percolate their way down. The purpose of the litigation hold, the second prong of our proposed text –

JUSTICE YOUNG: You want to make an affirmative obligation to issue a litigation hold.

MR. HINDELANG: No your honor, but we want to incentivize parties that do. If a party places a litigation hold in place and attempts to cover the scope of the lawsuit as known to them at the time, that then would protect them under this prong if the lawsuit –

JUSTICE YOUNG: Why do we need to do that when there is a common – as you say a common law obligation of preservation, and the sanction for failing to preserve evidence is you get all kinds of instructions – adverse instructions to the jury that would be very damaging to you? Why do we have to add bells and whistles to the common law rule or rule 37(e)?

MR. HINDELANG: The electronically stored information, or ESI, is fundamentally information the same as paper documents.

JUSTICE YOUNG: Right.

MR. HINDELANG: However, there's a certain vagility (phonetic) to it and also – and the flip side of the same coin, it has a tendency to live on in places that may not be reasonably found. And what this is attempting to do is protect parties that put the litigation hold in place, they preserve the information that everyone expects would be relevant, and then protects them when there's need for information outside of that –

JUSTICE YOUNG: Do we have to have a litigation hold for other kinds of fragile evidence?

MR. HINDELANG: The – when a lawsuit is filed initially, a litigation hold or something similar, whether you call it litigation hold –

JUSTICE YOUNG: Do we – do we have – have we codified the common law obligation of preservation for any other kind of evidence?

MR. HINDELANG: Not to my knowledge your honor.

JUSTICE YOUNG: Well, tell me why we should treat – and I have a sort of a philosophical approach to electronic – that we shouldn't treat this as a different kind of being unless there's a specific reason for it. What about electronic information makes it so unique that we have to do something more than what we expect people to do under our common law for every other kind of information?

MR. HINDELANG: Well, I absolutely agree with your predicate your honor. The first sentence we propose in 2.302(b)(5) says exactly that – the preservation duty for electronically stored information shall be the same as it is for all other types of information. The safe harbor provision – the second sentence that I propose under 2.302(b)(5) – now deals with the particular challenges of ESI meaning the potential for a routine computer system to – without human intervention – delete the evidence or some other sort of difficulty – human error, anything to delete the electronic evidence which is far easier than shredding.

JUSTICE YOUNG: People throw away paper documents on a routine basis.

MR. HINDELANG: That's true your honor. The –

JUSTICE YOUNG: So why do we treat this electronic information differently? That's what I'm looking for. Tell me why a routine deletion policy for electronics is different from any other routine destruction of hard information.

MR. HINDELANG: The easiest example I can give your honor is – for instance my email system every 90 days deletes the email that was 91 days old. And a litigation hold that affects certain information between – emails between me and certain parties would be stopped.

JUSTICE YOUNG: I bet your firm purges its records stored over a period of time too.

MR. HINDELANG: They do, however, that does not happen without human intervention. Those records come back for review, and then they're affirmatively deleted. The email happens without the involvement of any human, and that's the difference with ESI is there's so much of it, and it's so easily deleted from where we can easily view it and restore it that it is a different creature. The preservation duty should be the same because we don't want to create two different discovery regimes one for paper and one for electronic. However, an acknowledgement of the fact that there is the potential even in – with the best of intentions and the best good faith efforts by companies, you're never going to get 100% of the ESI set aside and preserved.

JUSTICE MARKMAN: Mr. Hindelang my concern is similar to Justice Young's, but just slightly different. I'm concerned that your use of the word "however" introducing this safe harbor provision suggests that the law is significantly different when it comes to nonelectronically stored information, and that there are different standards when information is lost or destroyed as a result

of good faith operation of an ordinary business. I mean it suggests that the standards are somewhat different - the "however" word.

JUSTICE YOUNG: Which is not true of the federal rule.

JUSTICE CORRIGAN: Can I just ask Mr. Hindelang? I think this is really an important area for us, and I am very grateful to your law firm for participating in our invitation – you're the only ones who really have come forward to help us. I would like it if you could define "litigation hold" in writing and send us something on that. And I mean I concur with all the questions that are being asked here, and I think these are hard issues for us and a huge decision for us.

JUSTICE YOUNG: Could I return to Justice Markman's question?

MR. HINDELANG: Yes, and –

JUSTICE YOUNG: I believe that you have created an affirmative obligation in an attempt to create a safe harbor which is startlingly absent from the federal rule. Why are doing that?

MR. HINDELANG: That was the opposite of our intention your honor, and if we've done so –

JUSTICE YOUNG: Do you see the potential for having done just that?

MR. HINDELANG: The word "however" as pointed out by Justice Markman I certainly do see the potential confusion. The point of the safe harbor –

JUSTICE YOUNG: I know what the point of a safe harbor is; I question whether you've done it - whether you've created a safe harbor or a – or whether you're throwing chum in the water and this will be the source of enormous shark-fest feedings of ancillary motion practice.

MR. HINDELANG: I don't believe so your honor for the following reason.

JUSTICE YOUNG: I suggest you – when you go back and satisfy Justice Corrigan's request, you consider whether you may well have done something other than your (inaudible).

JUSTICE CORRIGAN: I want to point out also – I mean I think that you're involved in a very distinct sort of practice and that we're trying to formulate

rules for the varieties of practice that exist in Michigan, so all the points that my colleagues are making are really critical. I mean are we gonna have some small business that doesn't engage in having record retention policies such as you described – they never even heard of a record retention policy – but they are computerized, and have you - you know elevated the standard in this sense that no Michigan small business that has to go out and hire a lawyer when they're sued they're gonna be caught up on this. And that's the kind of thing I'm worried about that you're functioning in a universe that's way different from what we ordinarily see, although computerization is so you know –

JUSTICE CORRIGAN: I mean pandemic – ubiquitous – thank you – in our state. So that's what I need help with.

MR. HINDELANG: And to be candid your honor we're actually – we view ourselves on the other side of the spectrum that the federal rules are geared toward the largest of the large –

JUSTICE CORRIGAN: Right.

MR. HINDELANG: and the appropriate rules are those that give the most flexibility –

JUSTICE CORRIGAN: Right.

MR. HINDELANG: and the most permissive authority to the trial court. Because we fully agree with you, the e-discovery gets so potentially expensive that the smaller civil cases simply become cost prohibitive to bring to court.

JUSTICE CORRIGAN: Right.

MR. HINDELANG: And that benefits no one. The purpose of the safe harbor and understanding that I do need to give it thought as to whether we created affirmative duty is to protect those parties who have made a good faith attempt to save the data. We certainly recognize that especially individuals - and I know full well with my personal computer or with small businesses where you may just have one computer or two computers that the deletion issues are still the same and the cost issues are even larger. Because – while you have a small amount of information to look at relative to the biggest corporations, you may not have deleted anything so you may have five years, seven years, of records that all need to be reviewed and the cost issues are dramatic. The safe harbor provision is, and this is why I'm giving – going to give significant thought to Justice Young's request, it's intended to do the opposite of the concerns that you Justices have

raised today, and it's intended to be a shield and not impose an additional obligation.

JUSTICE CORRIGAN: Thanks for – thanks for trying to help us out in this because it's hard.

JUSTICE MARKMAN: Mr. Hindelang I'd like to echo Justice Corrigan. I thank you and Mr. Devine for the outstanding work that you've given to this. I'd also like to say I think Justice Young's concerns are well taken not only with regard to (b)(5), but I'm also concerned in (b)(6) as to why you think a different standard in terms of reasonable access to information is required for electronically stored information as for nonelectronically stored information. I'm not quite sure why – there may be a good reason for it but it's not clear to me why there's a different standard in terms of the inaccessibility or the accessibility of electronically versus nonelectronically stored information.

MR. HINDELANG: And that one is relatively straightforward your honor. Backup materials and archived-type materials for electronically stored information is often stored in the format such as a backup tape that is very expensive to restore to a usable form. It's truly intended to be disaster recovery. You take one of these backup tapes, you move it offsite in case of a fire or other disaster, and only if something goes terribly wrong do you restore it. The – there's no analog I can think of for paper where even if you send it to offsite storage all you do is you bring it back and it's still in paper you can look at. What we're talking about is it's not reasonably accessible because there is a very dramatic cost burden to making that viewable to anyone in any form once it's taking off the backup. And that's what I think the federal rule is addressing in this comment.

JUSTICE MARKMAN: But doesn't the federal rule take into consideration the cost burden by allowing the judge to condition the discovery upon the payment of those costs by the party seeking the information.

MR. HINDELANG: And that's the purpose of our comment under that subrule is to adopt the federal comment (inaudible).

JUSTICE MARKMAN: But again I guess that gets back to my initial question, why don't we just adopt the same standard for the two kinds of information if they can be made similar simply by the payment of money.

MR. HINDELANG: That would be acceptable to me. The – I question whether there would be a frequent occurrence where paper documents would be not reasonably accessible because of the cost of making them accessible for review by the parties. But to make the standard the same I think is admirable and

making one discovery regime that applies to ESI, and paper, and whatever other sorts of material, is I think – or should be the ultimate goal. If we need to create certain protections because of the dangers of ESI, that's what we have to do because of the prevalence of computers. But in terms of a single standard I would certainly have on objection.

JUSTICE YOUNG: Thank you.

CHIEF JUSTICE TAYLOR: Thank you sir.

MR. HINDELANG: Thank you.

CHIEF JUSTICE TAYLOR: Mr. Quick are you ready for another run at us?

MR. QUICK: Certainly.

JUSTICE YOUNG: Who do you represent this time?

MR. QUICK: It depends who you might be mad at.

JUSTICE YOUNG: (inaudible) disappointed.

MR. QUICK: Let me make one preliminary comment and then dive into this issue of the safe harbor. And this is to your point Justice Corrigan. Repeating what Mr. Hindelang said, the rules in 2.401(b)(1) and (2)(c) are phrased "in the optional." It's not mandatory that the court necessarily involve itself in those issues, it is designed to wave a flag for everybody involved because certainly my experience personally, and I think the Sedona principles which then led to the adoption the of federal rules, was that if these issues are spotted and dealt with upfront it's much better than dealing with it half-way through litigation. So personally I'm not concerned, and the committee I don't think is concerned about unnecessary entanglement of the judiciary on that point. On the safe harbor issue there is a difference between the proposed 2.312(e) language and rule 37(e) of the federal rules, although I don't think that the intent of the committee was to alter the substance. What we tried to do –

JUSTICE YOUNG: I think it does.

MR. QUICK: Well –

JUSTICE YOUNG: I think it adds a burden that the federal rule does not.

MR. QUICK: In which regard?

JUSTICE YOUNG: In having an affirmative burden.

MR. QUICK: Well, I think that the federal case law is excruciatingly clear that there is an affirmative burden to interfere with the –

JUSTICE YOUNG: But that's the common law burden that runs across all forms of information that are relevant to litigation. It's not unique to electronically stored information.

MR. QUICK: I agree, and as adopted rule 37(e) does not expressly connect the dots between the preservation obligation and the safe harbor. By adopting this rule we don't think we are creating any change in the law at all, but making it clear –

JUSTICE YOUNG: Would it interest you that I think you have.

MR. QUICK: Yes, it would.

JUSTICE YOUNG: At least perhaps a couple of my colleagues think so too.

MR. QUICK: Well, my understanding and the committee's understanding is that as to all evidence –

JUSTICE YOUNG: Think the rule of unintended consequences, and I guarantee you there will be some.

MR. QUICK: And perhaps Justice could share –

JUSTICE YOUNG: The unintended consequences is judges think that you've created an additional burden that is unique, and not the common law rule, but something that's special about electronically stored information creating more affirmative obligations than exist for any other form of information.

MR. QUICK: Well, that certainly is something to be concerned about under the rubric of unintended –

JUSTICE YOUNG: Well, that's why we sent your colleague at the Honigman firm back to the drawing board to consider the concern.

MR. QUICK: I'm not – let me put it this way. I'm not aware of any case law out of the federal system for example that has concerned itself particularly with the difference between the 37(e) rules and the common law definition (inaudible).

JUSTICE YOUNG: But of course we're not bound by that.

JUSTICE CORRIGAN: Mr. Quick just out of curiosity, are other state courts grappling with e-discovery rules not – is there only the federal rule out there, and are there other states that are looking at these rules where their - you know varieties of practice would be more akin to Michigan's than what the federal courts are seeing?

MR. QUICK: There's actually a long list –

JUSTICE CORRIGAN: Okay.

MR. QUICK: and I have brought a print out with me and I can supply that to the Court of other states and it's all you know the internets a wonderful thing –

JUSTICE YOUNG: Is there some enormative rule out there that governs this same area?

JUSTICE CORRIGAN: Uniform rule or anything.

MR. QUICK: No, not that I'm aware of.

JUSTICE CORRIGAN: But – so would you be willing to submit some examples of what other state courts have done?

MR. QUICK: Absolutely.

JUSTICE CORRIGAN: Okay.

MR. QUICK: Absolutely.

JUSTICE YOUNG: I think really – I mean I've said it sort of facetiously but when we are drafting rules we really do want to take a broad look at things, and I do think it's important that unless there's some distinguishing characteristic about electronic evidence, as opposed to other forms, that we not create different pathways. And I can't caution you enough that while you think you're not creating an unintended consequence, you may well have done so. And so again, I look at the federal rule and it seems perfectly straightforward. I look at the rule as

proposed by members of the Honigman firm, and I say boy this is a lot different and has some fish hooks perhaps buried in it unintended perhaps but I look at it and I think a couple of my colleagues have looked at it and have a different reaction.

MR. QUICK: I would agree with you as to the Honigman, if we can refer to it that way, as to the Honigman proposal, but that the language that the committee and the Bar had proposed under 313(e) I'm not sure has all of the same concerns, but obviously your point is well taken and is something that the committee should consider and we'll supply some additional information to the Court along with models in other courts, other states, where they have either just picked up rule 37(e) directly, or they've reformatted it in some way for their purposes.

CHIEF JUSTICE TAYLOR: Thank you Mr. Quick.

MR. QUICK: Thank you.

CHIEF JUSTICE TAYLOR: Stay where you are because you're the next witness up on 2007-30. Mr. Quick. Oh you have to get your file I'm sorry.

ITEM #5 – 2007-30 – Proposed Adoption of the Amendment Of Rules 2.107 and 2.117 of the Michigan Court Rules

ITEM #6 – 2007-31 – Proposed Adoption of the Amendment of Rule 4.201 of the Michigan Court Rules

JUSTICE YOUNG: And you would be representing?

MR. QUICK: My appearance on behalf of item 30 and 31 falls under the category of may I answer any questions for the bench.

CHIEF JUSTICE TAYLOR: Okay, any questions?

JUSTICE CORRIGAN: Here's a question I have for the bench – I mean from the bench. On – is it okay to move to the next item Chief?

CHIEF JUSTICE TAYLOR: Sure, sure.

JUSTICE CORRIGAN: Okay, this is on the –

CHIEF JUSTICE TAYLOR: 31.

JUSTICE CORRIGAN: 31. I appreciate the concerns that the property managers have regarding duplicate appearances, and I was just wondering is there any reason – or what is the reason that summary proceedings have to be held in ten days? In other words, why couldn't we – I mean they're saying they can't get the certified mail return in time for the summary proceedings hearing, why couldn't the summary proceedings hearing be held a couple of days later so that they could have the certified mail return and wouldn't that solve all the issues where you get affective personal service plus everything would get done in one proceeding.

JUSTICE YOUNG: Except the landlord wants the premises.

JUSTICE CORRIGAN: Understood. But I mean how far are they willing to push it in order to save money? I'd like to know the answer to that. I understand their practical concern about coming back to court twice, but is there a way to solve both interests so that there is personal service – or effective service on the tenant and yet they get possession and they get a money judgment for their late rent.

MR. QUICK: Well, it clearly would – and I'm not trying to dodge your question, but it would be outside of the mandate of the Civil Procedure and Courts Committee to I think opine and we normally don't try to do this on issues of substantive law governing a particular topic. So whether or not, and this is to Justice Young's comment, you know within the real estate realm it makes sense to expand that –

JUSTICE CORRIGAN: Well, this is a Court proceeding and the Chamber of Commerce letter says we're not living in the real world; we don't understand how bad it is on landlords. And I'm – we've got a summary proceeding that says you know that hearing has to be held in ten days and they're saying we can't get the mail return. I'm trying to grapple with the real world problem of court procedure, not you know of landlord business. So –

JUSTICE YOUNG: You don't represent their interest do you?

MR. QUICK: No, I don't, but I – and I think the gist of the current proposed rule change under 4.201(g)(1)(b) is simply to clarify – as opposed to personal jurisdiction having to be obtained – that service of process actually be made given the clarity of the rules on what that all involves.

JUSTICE CORRIGAN: Right.

MR. QUICK: I'm not sure that that necessarily involves all that much of a substantive change –

JUSTICE CORRIGAN: Understood but you did read the letters on file in administrative 2007-31 that came in didn't you?

MR. QUICK: I'm aware of the letters, but I'm not authorized to take any substantive position on those issues.

JUSTICE CORRIGAN: All right, may be we'll hear it from the next person. Thanks.

CHIEF JUSTICE TAYLOR: Thank you.

MR. QUICK: Thank you.

CHIEF JUSTICE TAYLOR: Mr. Offenbacher.

MR. OFFENBACHER: I can see what I'm in for. Good morning. My name's Gary Offenbacher, I'm the president of the Property Management Association of Michigan, representing landlords. We have about 100,000 apartments in the state of Michigan that our organization represents. I'm a full time property professional, executive vice president of a management company, so hopefully I can bring some of the real –

JUSTICE YOUNG: Do you want to extend the time for summary proceedings on possession?

MR. OFFENBACHER: I'm sorry?

JUSTICE YOUNG: Do your clients want to extend the time for summary possession proceedings?

MR. OFFENBACHER: We do not.

JUSTICE YOUNG: I didn't think so.

MR. OFFENBACHER: We do not.

JUSTICE YOUNG: All right. Here's the problem.

JUSTICE CORRIGAN: Okay, well – all right.

JUSTICE YOUNG: Go ahead I'll yield.

JUSTICE CORRIGAN: Yeah, I'd just like to understand that because how long would it take to get the certified mail returns? I don't know the answer to that question.

MR. OFFENBACHER: Our process now takes us between 45 and 60 days to do an eviction. You know the whole process. Even though you'd like it to be quicker that's how long it takes.

JUSTICE CORRIGAN: Well, that's to get the person out of the premises right?

MR. OFFENBACHER: That's correct.

JUSTICE CORRIGAN: Okay.

MR. OFFENBACHER: What our hope – our wish is is that we get the money judgment to the same time frame as the eviction itself, and that we're allowed to have the same service –

JUSTICE CORRIGAN: But you've got due process issues with that in my opinion.

JUSTICE YOUNG: Do you understand? You would not want to have a valid judgment against you if you hadn't been personally served. I mean if you have a cottage someplace and they posted a notice that you're subject to a money judgment, you wouldn't want that to be an effective judgment against you would you - you have no notice.

JUSTICE MARKMAN: You're argument is that the –

MR. OFFENBACHER: Your honor I wouldn't want any judgment against me you're absolutely correct. And -

JUSTICE YOUNG: Yeah, but you'd like to have notice that there's somebody proceeding against your pocket wouldn't you?"

MR. OFFENBACHER: I'm sorry your honor.

JUSTICE YOUNG: Never mind go ahead.

MR. OFFENBACHER: The issue – you know I'm not a litigator and I apologize for not being a litigator, but here's –

JUSTICE YOUNG: No, but this is real obvious –

MR. OFFENBACHER: It's real world and I understand –

JUSTICE YOUNG: Real world is we want people to be on notice that somebody is suing them for money, and what you're trying to do is make a distinction between the kind of notice that is appropriate when you're trying to seize somebody's property – you can post a notice there because you presume that they – that's where their real property interest lies and posting is sufficient, but people proceeding against people requires a different level of notice.

MR. OFFENBACHER: I understand your honor. Isn't the issue though -

JUSTICE MARKMAN: Can I just say something?

MR. OFFENBACHER: I'm sorry.

JUSTICE MARKMAN: Your argument is that the money judgment and the eviction are so inextricably connected that the service with regard to the money judgment suffices in 99.9% of the cases dealing with the eviction.

MR. OFFENBACHER: Exactly. They know – you know they know about the eviction. They are personally served whenever possible at a minimum it's posted. What happens in the real world as we talked about earlier is in today's day and age unless you're serving a corporation, individuals do not accept certified mail. I will argue that point all day long because we know we send certified letters for other things they aren't never ever ever collected by the tenant. For one reason many of the tenants don't even have the money, or the gas, or whatever to get to the post office quite honestly. Beyond that the – just the posting on the door is really the most affective service, but we also send it by U.S. Mail and everybody gets their U.S. Mail because what they're looking for quite honestly often is payments, or checks, or whatever so they are well aware. It really becomes an economic issue. You know we end up having to file –

CHIEF JUSTICE TAYLOR: Do some of these people perhaps think that something that comes certified is gonna be a problem?

JUSTICE YOUNG: Not good news.

MR. OFFENBACHER: I'm sorry?

CHIEF JUSTICE TAYLOR: Is it your sense that people who don't go down to the post office and pick up their certified mail may very well have an idea that's bad news waiting for them?

MR. OFFENBACHER: Absolutely. The difference is when you serve a corporation you have a clerk or a reception at the office accepts that.

CHIEF JUSTICE TAYLOR: Yeah.

JUSTICE YOUNG: Sure, we understand. Usually if you're behind in your rent getting a certified letter probably is not good news.

MR. OFFENBACHER: Right they've been already notified at least twice before they get you know that kind of notice. They're well aware -

CHIEF JUSTICE TAYLOR: right.

JUSTICE CORRIGAN: How many days does it take to get it back from the U.S. postal authorities after you make the effort on the certified mail?

MR. OFFENBACHER: They make two attempts –

JUSTICE CORRIGAN: Okay.

MR. OFFENBACHER: and between attempts is one to two weeks has been our personal experience. So it usually takes about four weeks –

JUSTICE CORRIGAN: Four weeks on certified mail.

MR. OFFENBACHER: three to four weeks to get back the notice that it was not signed for.

JUSTICE MARKMAN: Are there any other states that integrate these processes to the best of your knowledge?

MR. OFFENBACHER: I'm sorry?

JUSTICE MARKMAN: Are there any other states that integrate these processes in the way that you'd like to see done in Michigan?

MR. OFFENBACHER: I am not – I have not studied up on that, but I believe Arizona might be a state that has a similar –

JUSTICE MARKMAN: Well, speaking as one Justice, I'd be interested in seeing what other states do in this regard if you have any information share it with us.

MR. OFFENBACHER: Okay.

CHIEF JUSTICE TAYLOR: Thank you Mr. Offenbacher.

MR. OFFENBACHER: Okay, thanks for hearing me.

CHIEF JUSTICE TAYLOR: Thank you. Item #7 – 2008-19 – Karen Stephens.

ITEM #7 – 2008-19 – Retention of the Amendment of Rule 3.928 of the Michigan Court Rules

MS. STEPHENS: Good morning. Thank you for the opportunity to address this public hearing. I'm Karen Stephens and have previously commented on certain – pardon me I had pneumonia about a month ago – commented on certain court rules and their abuses by judges and officers of the court. Instead of offering my opinion on the subject of expanding the contempt of court penalty, I would like to direct the Court's attention to documentation of abuses of the Court's contempt powers and whether changing this court rule would make matters worse. To refresh this Court's memory, the Oakland Martha Anderson court granted multiple personal protection orders based on perjury to prevent me from associating with Marie Dreilich, another scammed client of our common attorney Paul Nicoletti. Marie Dreilich was jailed twice for contempt for a total of eight days for accompanying to the Oakland McDonald court. There are actually three separate PPOs granted under different court case numbers and not served. However, multiple PPOs were renewed after they expired so these could be double counted. The same attorney, Paul Nicoletti, then petitioned the Martha Anderson court for a PPO against me again based on more perjury. When I discovered this perjured PPO petition, I responded even though I was not served as it was Mr. Nicoletti's real intent to create a false public record to jeopardize my employment. The Anderson court threatened me with contempt with no case, just told me to pay the clerk $500 with no order, which is extortion, and was ready to put me in jail over Christmas. Mr. Nicoletti claimed I fabricated the public record documents which I sent his mother regarding Mr. Nicoletti's embezzlement of my insurance check, the malpractice cases and restraining orders against him, the over $100,000 in sanctions and other adverse Nicoletti public records. I invite this Court to view both Judge Martha Anderson's hearings with threats of contempt now on

YouTube.com and see the show cause hearing with the obvious extortion and abuse of contempt powers. I also invite this Court to go to the conservative Mackinac Center's property rights web page and view the two – King of the Wind Farm videos where a senior citizen couple was fined $7,500 and jailed for a week for contempt in Macomb County after the judge visited their farm. The husband was put in the jail's infirmary. Incidentally, both the Michigan House and Senate got into the act too. They passed a law the same day specific to these King of the Wind farm cases, property rights cases, and the bill was not on the agenda for either the House or the Senate. The underlying issue in this case is regarding the development of this farm to generate local revenue. I alert the Court to two books by Zohar McMillan about the Oakland County Circuit Court. The second with the subtitle *Corruption in the Michigan Judicial System* has just become available on authorhouse.com's website. I invite the Court to view courthouseforum.com's Michigan page where Michigan residents are not shy about exposing abuses. There are also reports on ripoffreport.com regarding judges and attorneys. There's no remedy for – in Michigan for abuses of the court's contempt powers. And as a side, three of these cases as I'm reading this over has to do with intimidation regarding underlying property rights cases. So the contempt powers are being used as an intimidation message to myself, Marie Dreilich, and the Michaels and the King of the Wind Farm case.

CHIEF JUSTICE TAYLOR: Are there any questions for Ms. Stephens? Thank you very much Ma'am.

MS. STEPHENS: Okay, thank you.

CHIEF JUSTICE TAYLOR: We will stand in recess.